Supreme Court of the United States

OCTOBER TERM, 1945

No. 316

ISIDORE B. BERNSTEIN,

Petitioner,

against

EMS CORPORATION,

Respondent,

and

LEOPOLD OLIAN and MORRIS CANTOR, co-partners doing business under the firm name and style of OLIAN & CANTOR,

Defendants.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Maurice Wormser,
Leo F. Porth,
Counsel for Respondents.

Charles H. Lane,
Sidney J. Lane,
On the Brief.

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Statement

The petition and the accompanying brief in this matter are incomplete and in many instances inaccurate.

The applicant has avoided any discussion of the vital point on which the unanimous Court of Appeals (174 F. [2d] 880) determined the case, namely, that there was complete lack of proof of notice to the landlord of any defect in the instrumentality which caused the injury.

Indeed, the evidence affirmatively established that there was no notice.

* References are to folios in record, unless otherwise noted.

Question Presented

The real issue presented on the appeal below was succinctly summarized by SWAN, J., in his opinion (pp. 436-437), wherein he said:

> "Assuming *arguendo* that the landlord did retain control over the site of the dangerous condition, nowhere in the record is there any basis for finding that it received any notice of the danger or could by the exercise of reasonable care have discovered it. A landlord is under no absolute duty to maintain in safe condition those portions of the building over which he reserves control. Unless he knows or in the exercise of reasonable care ought to know, of the existence of the defective condition, liability does not attach to him. *A. L. I. Restatement of Torts, §361; Hirsch* v. *Radt,* 228 N. Y. 100; *Kramer* v. *Stone,* 176 App. Div. 549, 551. The plaintiff concedes that Ems Corp. had no actual notice. Nor was there any evidence of conditions which should have caused the lessor to suspect the danger. Mr. Olian, it is true, testified that jarring and vibration of the ceiling was frequently caused by the moving of heavy cases of rayon by the tenant who occupied the floor above the store premises and that on one occasion he complained about it to the superintendent of the building. But the date of this complaint was early in 1942, before Ems Corp., had acquired title. Hence notice of the jarring and vibration given to the superintendent was not notice to an agent of the appellant. *And the vibrations did not produce any visible effects, for there were no bulges or cracks in the ceiling and no other lighting fixture had ever fallen. In short we can see no basis whatever for charging the lessor with notice of the faulty installation of the fixture.* To have discovered the defect, it would have been necessary to climb up on a ladder, remove the canopy and ex-

tract the screws from the base-plate to make sure they were of proper length. And since nothing pointed to this particular fixture as defective, such an inspection would have had to be made of all the electric fixtures in the ceiling. We are clearly of opinion that *when there is nothing to suggest faulty installation, the lessor's duty of 'reasonable care' does not require him to make that sort of an inspection.* To hold the appellant liable would in effect make the landlord an insurer of the safety of business guests. That is not the law. The lessor's motion to dismiss for failure of proof of negligence should have been granted. Accordingly the judgment must be reversed and the complaint dismissed. It is so ordered." (Italics ours.)

It is noteworthy that the determination now sought to be reviewed was reached after oral argument consuming two hours on March 8th, 1949, with no decision for eleven weeks thereafter until May 24th, 1949, thus evidencing careful, thorough and painstaking consideration by three Jurists whose ripe judicial experience and scholastic attainments have earned the respect and regard of Bench and Bar alike.

Reasons for Denying Writ

Defendant Ems had no notice of any alleged defect

Petitioner alluded (Brief, p. 3) to the opinion of Judge NORDBYE after the first trial; but Judge NORDBYE evidenced doubt as to plaintiff's right to recover, as witness (p. 26):

> "The question of liability may well have caused some pronounced differences of opinion in view of the evidence and the applicable law * * * *if* plaintiff is entitled to recover, the amount of damages returned by the jury is grossly inadequate." (Italics ours.)

Petitioner contended (Brief, p. 4) that the Court below, on its own view of the evidence, concluded that petitioner had produced insufficient evidence and could never do otherwise. That is not so. The Court of Appeals acted upon the record as it found it; and when it found that *no* evidence had been adduced respecting so vital an element in negligence law as "notice," the Court had no choice except to dismiss. As an example, in *Still* v. *Union Circulation Co., Inc.* (101 Fed. (2d) 11), the Trial Judge held that there was no evidence upon which a reasonable finding of liability could be based to support plaintiff's verdict, he set the verdict aside and directed a verdict for defendant, the Circuit Court of Appeals affirmed, and this Court denied certiorari (308 U. S. 565).

Plaintiff here clamors for a new trial which can avail him nothing. The record of this trial established that on no possible theory can he present evidence which would uphold a verdict against this defendant Ems Corp.

His very able trial counsel would have adduced evidence of notice if any were available to him.

There were never any cracks or bulges in the ceiling (fols. 594-7; 633-4; 694; 865-6).

No fixtures had ever fallen before this one (fols. 599; 630; 700).

The ceiling admittedly was in good condition previous to to this accident (fols. 597; 633-4; 864-5).

It is well known, as the testimony established, that cracks frequently appear as a warning of impending disaster (fols. 763; 786-7), but here there were *none* (*supra*).

There was thus no evidence whatsoever of any indication that the ceiling was in any way defective or that any accident would occur and when the Circuit Court of Appeals inquired of plaintiff's counsel, on the argument, to point to the least reference to evidence of "notice", he found himself unable to do so (other than the jarring mentioned

in Judge SWAN's opinion,—about which no complaint was made at any time during all the lengthy period of three years after Ems Corp. had acquired title).

The tenant Olian specifically testified that he "never observed anything wrong with the ceiling or the lights or the fixtures" (fols. 633-4). As the tenant in possession never observed any dangerous condition, and hence never in any way directed the attention of the landlord thereto, it stands to reason that the landlord, which was always *out* of possession, had neither actual nor constructive notice.

Though the landlord, the Ems Corp., owned the building, purchasing the same in November 1942 (fols. 706-7), Olian & Cantor, the tenants, had come into the building long before,—in 1938 (fols. 584-6; 626-7).

It was the tenants who installed, at their own expense, the particular light globe, including the canopy, at the ceiling (fols. 587-90; 624; 627-30; 893-4). This was done approximately *four years before* the Ems Corp. purchased the building, and approximately *seven years before the accident* (fol. 626).

Admittedly, there was no notice by the tenant to the landlord, Ems Corp., of any defective condition.

In the recent case of *Lefkowitz* v. *City of New York*, 297 N. Y. 769, affirming 269 A. D. 666, the New York Court of Appeals unanimously affirmed a judgment dismissing the complaint, on the ground that there was no evidence of actual or constructive notice to the defendant of the defective condition. The Appellate Division had said (269 App. Div. at p. 666):

> "There is no evidence of any actual notice to defendant that the turnstile was out of order before the alleged accident. Nor is there sufficient evidence of any constructive notice to charge the defendant with knowledge of the defective condition complained of."

See also:

Molte v. *Corn Exchange Brank Trust Co.*, 267 N. Y. 544;
Cullings v. *Goetz*, 256 N. Y. 287;
Altz v. *Leiberson*, 233 N. Y. 16, 18;
Irons v. *William Steiner Sons & Co., Inc.*, 246 N. Y. 599;
Weingard v. *Putnam Theatrical Corp.*, 225 App. Div. 808;
Burnstein v. *Haas*, 298 N. Y. 596, 597.

Petitioner urged (p. 5) that the fixture was defectively fastened to the ceiling beam and (p. 6) that therefore the plaster would be pulverized "immediately" upon insertion and that this would be visible to anyone working at it.

Not only is that statement unsupported by any reference to the record, but it is contradicted by what has already been demonstrated as to the total absence of any cracks or bulges in the ceiling (594-7; 633-4; 694; 865-6) and by the testimony of the tenant *in possession* that the ceiling was in *good* condition prior to the accident (597; 633-4; 864-5).

An effort has been made (p. 6) to charge defendant with notice on the theory that jarring of the ceiling was claimed to be caused by reason of the action of tenants above Olian & Cantor.

None of that evidence was introduced in plaintiff's case, so that, whatever its effect might have been, a *prima facie* case was not established, and the point was saved by both motions to dismiss.

Moreover, the evidence in that respect was wholly inadequate. Over objection, Olian was permitted to testify that in handling cases of rayon in the loft above his store, there

was knocking and jarring (fols. 672-6). He said that it happened in all parts of the store, but that it never induced him to make any examination whatever of the ceiling (fol. 676).

Manifestly these alleged occurrences had no effect on the ceiling, for Olian expressly testified that he *"never observed anything wrong with the ceiling or the lights or the fixtures"* (fols. 633-4).

[See, too, Judge SWAN's opinion, *supra* (Record, p. 437).]

A definite idea as to the unimportance of this "knocking and jarring" may be obtained when it is remembered that the testimony disclosed that it had continued for years and right up to the time of trial, without any evidence whatever of damage either to the ceiling or to the fixtures.

Moreover, the accident in suit was the *only* accident of its kind (fol. 700).

Olian claimed that he notified the superintendent of the building (fols. 701-4), but that was stoutly denied (fols. 837-9).

It developed, however, that this alleged notice to the superintendent was given in early 1942, while Ems never took possession until November 1942 (fols. 706-7) and—most important—the superintendent was *only* notified on that *one* occasion (fol. 707).

Hence it affirmatively appeared that these noises were *never* called to anyone's attention during the three years of ownership of the building by this defendant, Ems Corp. How then can this defendant be held responsible, even if notice was given to the superintendent as testified, on one occasion, and over three years before the accident—in view of the other relevant facts, particularly as such alleged notice was given months before defendant became the owner and at a time when the superintendent was not its employee?

The testimony as to one and *only one* complaint (707) refutes the untrue statement in petitioner's brief (p. 7) referring to "complaints" (plural), and of course, there was no evidence of any complaint *after* Ems Corp. became the owner of the premises.

Landlord out of possession and control not liable to a business visitor of tenants

Petitioner's brief (p. 7) tabulated certain provisions of the lease, but there were other significantly *omitted* clauses in that lease which were vitally significant.

Paragraph "5" of the lease specifically provided as follows:

> "Tenant shall take good care of the demised premises, *and of the fixtures therein.*"

That paragraph, then, imposed liability on the tenant and *not upon the landlord.*

The landlord was given permission to repair any damage to the demised premises at the expense of the tenant if caused by the tenant or its employees; but that provision imposed *no obligation upon the landlord to do so.*

Another provision of the lease, wholly disregarded by the Trial Judge, was paragraph 10, which expressly exonerated the owner from liability for injury from falling plaster or appliances *unless due to the landlord's negligence.*

Paragraph "16" of the lease provided that the tenant would permit the landlord to install and maintain pipes and conduits through the premises, and that the landlord could enter them for the purpose of examination and to show them to prospective purchasers and lessees or to make repairs; but the concluding sentence specifically provided that it did not impose any obligation or liability on the landlord for care, supervision or repair other than as therein otherwise provided.

In short, the obligation of maintenance of the leased premises, as such, rested *upon the tenants.* The operation and maintenance of lighting fixtures, especially such as were installed by the tenants, would devolve exclusively *upon the tenants.*

In the case of *Homin* v. *Cleveland and Whitehill Co.,* 281 N. Y. 484, the Court of Appeals considered the liability of an owner-landlord to an injured window cleaner, under the provisions of Section 202 of the Labor Law. The issue, briefly stated, was whether the owner was "in charge" of the building involved in the accident, by reason of a clause in the lease which reserved to the landlord the "privilege to enter, to examine the premises or to make repairs which it thought to be requisite" (p. 489). The Court held (p. 489):

> *"Mere reservation by the landlord of the right to inspect the building or to make repairs, if necessary, did not operate to place it in charge of the building or of the particular premises where the accident happened nor impose upon it any obligation to the deceased. Cullings* v. *Goetz,* 256 N. Y. 287."

A complete answer to plaintiff's claims in the case at bar may be found in the closely analogous case of *Potter* v. *N. Y., O. & W. Ry. Co.,* 261 N. Y. 489, wherein the New York Court of Appeals said at page 495:

> "* * * The railroad men, so far as the record shows, never entered the pocket, except on *rare* occasions to make *needed repairs.* That they so entered was not sufficient to indicate that the railroad reserved a measure of control over the pocket, or retained power *to forbid or permit visitors to make entry thereto.* (*Cullings* v. *Goetz, supra.*)"

The same condition existed here.

The employee of Ems might have gone into this store on rare occasion to repair leaks (fols. 890-2; 907-8), but Ems had *no master key* (fols. 702; 866-7); Ems was never in the premises for painting between 1941 and 1945 (fol. 670). Ems had no "power to forbid or permit visitors to make entry thereto," and the complete absence of any control by Ems over the fixture in question was demonstrated by the fact that *after* its superintendent cleaned up the debris (fols. 613; 854), *he left the fixture and the globe in the premises of Olian & Cantor* (fol. 910).

Furthermore, with such ready response to calls from the tenant for leaks (fols. 890-2; 907-8), the Superintendent would certainly have given attention to so vital a matter as a damaged ceiling or threatened injury as a result thereof, if it had been called to his attention and if the landlord was responsible for the same.

In view of the terms of the lease which merely confer upon the landlord the privilege to make repairs, the fact that the landlord did make such repairs after the accident in no way constituted an admission of an obligation to do so. See *Elefante* v. *Pizitz* [182 App. Div. 819 at pp. 821-822 (aff'd 230 N. Y. 567)].

Exception was taken whereby this point was preserved (fols. 1239-1240) and, in view of the terms of the lease, the act of the landlord in making the repairs was purely gratuitous and, as a matter of law, could not be construed as a recognition of legal liability.

The provisions of the lease imposed *no obligation* on the landlord to make any repairs.

Paragraph "4" forbade the tenant to drill into the premises or to do any boring or to string any wires. Nevertheless, that was precisely what the tenants *did* in this case in installing lamps and globes in their store. They might do those acts with the prior written consent of the land-

lord, but certainly that particular provision of the lease imposed no liability on the landlord to the tenant who willfully violated it or to the tenant's customers.

It is *incomprehensible* that the jury should have exonerated the tenants *in* possession and inculpated the landlord *out* of possession, a point strongly urged by defendant in the Court below, but not necessary to its determination. Petitioner states (p. 9) that the Trial Judge denied petitioner's motion to set aside the verdict in favor of the tenants. He should have added (in all fairness) that that occurred only *after* the reversal in the Circuit Court of Appeals.

The petitioner claimed (p. 9) that the Circuit Court of Appeals reversed and dismissed "solely" on the ground that the evidence was insufficient to show that respondent knew or had reasonable cause to know of the dangerous nature of the ceiling. That was only one of the reasons.

A reference to the opinion will demonstrate (Rec., p. 436) that the Court alluded to *Cullings* v. *Goetz,* 256 N. Y. 287, 290, a notable decision written by Judge Cardozo in a suit involving the question of lessor's liability at the instance of a lessee or visitors of a lessee for failure to keep premises in repair under a lease.

Judge Cardozo said (256 N. Y. at p. 290), and it has been oft repeated since:

> **"* * * By preponderant opinion, occupation and control are not reserved through an agreement that the landlord will repair * * *. The tenant and no one else may keep visitors away till the danger is abated, or adapt the warning to the need. The landlord has at most a privilege to enter for the doing of the work, and at times not even that if the occupant protests." (Emphasis ours.)**

At page 292 he further said:

> **"If there is no remedy for the tenant, there is none for visitors or relatives present in the tenant's right** (*Miles* v. *Janvrin, supra,* at p. 440; *Elefante* v. *Pizitz,* 182 App. Div. 819, 821)."

See also:

Lafredo v. *Bush Terminal Co.,* 261 N. Y. 323, at p. 325;
Campbell v. *Holding Co., Inc.,* 251 N. Y. 446, at p. 448;
Kosier v. *Pomrinse,* 249 App. Div. 196, at p. 197;
Stein v. *Pershing Square Bldg. Co.,* 191 Misc. 30, at p. 31;
Doyle v. *Union Pacific Railway Co.,* 147 U. S. 413, at pp. 422, 423;
Dyer v. *Robinson,* 110 Fed. 99, 100, 101.

The most recent exposition of this phase of the law of New York was *Dennis* v. *Rockefeller Center, Inc.,* 270 App. Div. 524 (aff'd 296 N. Y. 741), where the Trial Court charged that a landlord was under a non-delegable duty to maintain the floors, walls, ceilings and staircases in a reasonably safe condition; that, if the owner in that case created the condition causing the accident, it was not necessary to find that it had notice thereof, but if it had merely permitted the condition to exist, then the jury would have to inquire whether the owner actually knew, or should, through long lapse of time, have known of its existence, and, in that connection, that the question would arise of access to the portion of the leased premises where the accident occurred.

The Appellate Division, in reversing the judgment for plaintiff and dismissing the complaint, said at page 526:

> "The jury was thus permitted, without finding that the landlord or its contractors had created the

condition, to fasten liability on the landlord simply by finding that the condition was of such duration that the landlord should have learned of it.

The charge cannot be sustained. Apart from statutory imposition, as in the case of multiple dwellings, *a landlord is not liable to employees or invitees of a tenant for the condition of leased premises.* (Cullings v. Goetz, 256 N. Y. 287; Werter v. Samsky, 286 App. Div. 913.) Plaintiff points out that the landlord operated and managed the building, and had an obligation under the lease to clean the premises, and plaintiff claims the landlord thereby assumed responsibility for the condition of the premises. The management and operation here do not appear to be more than the usual landlord management and operation of an office building, which do not constitute a degree of control of leased space to include responsibility to a tenant's invitee for the condition of leased premises, and mere access to the leased premises for cleaning purposes would not create such responsibility. Whatever might be the landlord's responsibility on a showing that the condition which caused the accident was of its creation, the landlord may not be held, as the charge permitted it to be held, for a condition in leased premises of unidentified origin and duration." (Italics ours.)

That case (decided by the Court of Appeals in 1948) was much later than *Scudero* v. *Campbell* or *Antonsen* v. *Bay Ridge Savings Bank* referred to in the Trial Court's opinion (1267-8). Based as it was on *Cullings* v. *Goetz,* it is clear indication that the classic opinion of Judge Cardozo in *Cullings* v. *Goetz* is still the law and remains unaffected by the readily distinguishable decisions mentioned by the Trial Court.

There is nothing "shocking" in the result of this case as claimed by petitioner in his brief (p. 10), nothing more

shocking than in the *Still* case, *supra,* and the many other decisions in which plaintiffs fail to establish a valid cause of action.

Petitioner himself cited (p. 10) *Montgomery Ward & Co.* v. *Duncan,* 311 U. S. 243, wherein this Court recognized the power of the Circuit Court of Appeals to reverse and direct judgment n. o. v. That power was properly exercised here, where there was not only a total absence of proof of notice, but affirmative proof of *no notice.*

The passing intimation that plaintiff should be afforded an opportunity to correct a deficiency when the Court finds that the jury's verdict is against the weight of evidence (p. 12) is wholly inappropriate, since the determination here was not based on weight of evidence, but wholly on *absence of any evidence* as to a vital factor in the case.

And so the unfair and caustic criticism of the Court of Appeals, Second Circuit (pp. 12-13) should receive not even scant consideration, both for the reason that its action in overturning the verdict of this jury was not only based on such extended argument and careful and lengthy review by three outstanding jurists, but also was predicated on an affirmative showing of the absence of an essential prerequisite to liability on the part of this defendant.

The cases cited by petitioner (p. 13) all had reference to the issue of control. One of them, *Rosenberg* v. *Rosenberg,* 247 App. Div. 765, is actually a determination in our favor, for there the evidence was that defendant retained in his possession, and exercised dominion and control over, the particular instrumentality which caused the injury. *There,* defendant, under the proof, was upon the premises frequently.

Here the tenants were in sole possession and control; the Trial Court so charged (fol. 1220). Furthermore, the Trial Court refused to charge the requests of the tenants that they were not in control of the ceiling and the electrical

fixtures (fol. 1236). If the tenants were thus in possession and control, as the Trial Court charged, and if there was nothing to attract the attention of the tenants to any defective condition, as the tenant Olian testified (fols. 633-4), then the landlord could not be held chargeable with knowledge or notice, and therefore could not be ruled to be negligent, especially where the tenants in possession and control were expressly exonerated by the jury. Therefore, the verdict exonerating the tenants and charging the landlord with liability, was manifestly preposterous as well as inconsistent with the admitted facts of the case. It was the result of misplaced sympathy and of bias against a large corporation.

The basic point of lack of notice to the landlord was expressly reserved on the motions to dismiss, being particularly specified on each occasion as one of the grounds for the motion (fols. 568-9; 1175-6).

In each instance, exception was duly noted to the denial of the motion (fols. 579; 1176).

No mention whatsoever of the matter of "notice" was made, however, in the Court's cryptic instructions to the jury. The jury thus was misled.

Petitioner erroneously contended (p. 14) that defendant could have removed the canopy and discovered the allegedly defective condition of the ceiling, but, as Judge SWAN pointed out (Rec., p. 437):

> "* * * In short we can see no basis whatever for charging the lessor with notice of the faulty installation of the fixture. To have discovered the defect, it would have been necessary to climb up on a ladder, remove the canopy and extract the screws from the base-plate to make sure they were of proper length. And since nothing pointed to this particular fixture as defective, such an inspection would have had to be made of all the electric fixtures in the

> ceiling. We are clearly of opinion that when there is nothing to suggest faulty installation, the lessor's duty of 'reasonble care' does not require him to make that sort of an inspection. To hold the appellant liable would in effect make the landlord an insurer of the safety of business guests. That is not the law."

It was urged by petitioner (p. 14) that notice had been given to the respondent's agent, but as Judge SWAN said:

> "* * * But the date of this complaint was early in 1942, *before* Ems Corp. had acquired title. Hence notice of the jarring and vibration given to the superintendent was not notice to an agent of the appellant."

Cases cited by petitioner distinguished

The few cases in which this Court reversed the Circuit Court of Appeals for usurping the jury's function (Petr.'s brief, p. 15) have no application here at all.

Each and every one of those cases presented an instance in which there was *some* proof upon which the verdict of the jury might be based. *Conway* v. *O'Brien* was a case where this Court held the evidence sufficient to go to the jury on the issue of gross negligence, which was an essential element there; *Jacob* v. *New York City* was an action where the question at issue was whether the injury was due to a defective or insufficient appliance; *Berry* v. *United States* simply held that the power to dismiss in the Appellate Court did not deprive the jury of the power to weigh the evidence and decide contested issues of fact.

In the *Conway* and *Berry* cases no motion had been made, as here, for judgment n.o.v. following the verdict; but in all three cases the decisive factor was the presence of sufficient evidence to warrant the jury in deciding one way or the other, and *not,* as here, the total *absence* of *all* evidence on so essential an element of the case as "notice".

The petitioner (p. 16) alluded to certain hypothetical injustices resulting from the failure of a Circuit Court of Appeals to agree with a Trial Judge. If the Trial Judge should dismiss a complaint (as should have been done here) because of failure on plaintiff's part to prove an essential element of his cause of action, there is surely no injustice to anyone if the Appellate Court does so. The injustice would be if it lacked the courage to do so. The petitioner's argument is simply a strained effort to find some basis for his petition for certiorari in an ordinary negligence action.

Petitioner's claim (p. 17) that the decision here produces a conflict with the New York decisions is demonstrably unfounded, for the result here conforms with those decisions as heretofore established. As appears from the *Lefkowitz* case and the many others cited and quoted, *notice* of a defect is a *sine qua non* of liability in a negligence case of this type.

Petitioner argues (p. 19) that he has been denied recovery against either landlord or tenant. It certainly is not the fault of the Circuit Court of Appeals that the jury erroneously exonerated the tenants in possession and control and that the Trial Judge erroneously denied the plaintiff's motion to set aside the verdict in favor of those tenants. That conclusion can be readily remedied by an appeal on plaintiff's part to the Court of Appeals against the Trial Judge's erroneous determination in favor of the tenants.

Nor is it true, as boldly stated by petitioner (p. 19), that the decision of the Circuit Court of Appeals is in conflict with the opinion of two District Judges and the verdict of two juries and in flat conflict with the decisions of the New York Courts. Where one District Judge felt that the low verdict was due to the question of liability which "may well have caused some pronounced differences of opinion," and where both District Judges erroneously allowed the

juries to consider the case without requiring any evidence whatsoever of notice, and where the decisions of the New York Courts explicitly and unequivocally require proof of notice before liability could ever be fastened upon a landlord out of possession and control, the determination of the Court of Appeals in the case at bar was unquestionably correct and just.

No Question of Public Importance is Involved and no Law Point Which is in Serious Doubt or in Conflict

While petitioner asks for a writ of certiorari and seeks to create a question of public importance, there is no real basis for any such hackneyed claim. "Much ado about nothing"!

It is preposterous for petitioner to urge that any question of great public moment is involved or that there has been any decision herein which involves a conflict of authority. It is merely a question of applying the law to the set of facts herein involved.

This case was exhaustively considered by the eminent Court of Appeals, and no question of public importance or conflict of authority is involved which warrants further review by this Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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